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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1064

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania, *Appellants*

v.

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND, Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated, *Appellees*

On Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
QUESTION PRESENTED BY AMICUS	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
1. Placement in a mental institution is a constitutionally significant deprivation of liberty and carries with it other serious and important adverse consequences	8
2. Confinement in a mental institution cannot be constitutionally imposed by the state or under the authority of state law without adequate procedural safeguards	13
A. The District Court's emphasis on the right to adequate notice and to counsel was appropriate in light of applicable precedent and the factual record	15
B. The right to counsel, in particular, has been emphasized by the American Bar Association as a matter of sound judicial administration	17
C. The District Court was correct in finding that the Pennsylvania scheme for admission or commitment of children does not satisfy the requirements enumerated above	18
D. The labeling of juvenile mental disability commitments as civil (rather than criminal), benevolent, or voluntary does not affect the applicability of the due process clause	20
E. The imposition of due process protections upon the institutionalization decision is necessitated both by the risk of erroneous psychiatric and other judgments and by the need to ensure that less restrictive alternatives are adequately explored	21
3. No justification appears or has been advanced for denying to children facing commitment on	

Page

mental disability grounds substantially the same procedural protections which are required for adults under the due process clause 25

A. The decisions of this Court indicate that parental authority is not without limits, and that children, as well as adults, are entitled to constitutional protections 25

B. This Court's recent decisions with regard to abortion reflect the proper balancing of interests to be applied in the instant case 27

C. The District Court properly accommodated the interests of the parent and child in requiring due process safeguards 28

D. It cannot be assumed that parents, faced with legitimate familial problems, will always act in the best interest of their children with regard to commitment to a mental institution 30

E. Claims of alleged traumatizing or disruptive effects of due process protections for children are not supported by the record 31

CONCLUSION 33

TABLE OF AUTHORITIES

CASES:

Arnett v. *Kennedy*, 416 U.S. 134 (1974) 8
Bartley v. *Kremens*, 402 F.Supp. 1039 (E.D. Pa. 1975) ..... *passim*
Baxstrom v. *Herold*, 383 U.S. 107 (1966) 8
Bell v. *Burson*, 402 U.S. 535 (1971) 13
Bell v. *Wayne County*, 384 F.Supp. 1085 (E.D. Mich. 1974) 14, 15
Bellotti v. *Baird*, —— U.S. —— (July 1, 1976) 27, 30
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 12
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 13
Breed v. *Jones*, 421 U.S. 519 (1975) 21, 26
Cafeteria Workers Union v. *McElroy*, 367 U.S. 886 (1961) 13
Covington v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969) .. 23
Davis v. *Watkins*, 384 F.Supp. 1196 (N.D. Ohio 1974) 12
Denton v. *Commonwealth*, 383 S.W. 2d 681 (Ky. 1964) 14

Page

Dixon v. *Attorney General of the Commonwealth of Pennsylvania*, 325 F.Supp. 966 (M.D. Pa. 1971) .. 14
Dixon v. *Weinberger*, 405 F.Supp. 974 (D.D.C. 1975) 23
Doremus v. *Farrell*, 407 F.Supp. 509 (D. Neb. 1975) .14, 15
In re Gault, 387 U.S. 1 (1967) 9, 12, 14, 21, 26
Greenwood v. *United States*, 350 U.S. 366 (1956) 22
Ginsberg v. *New York*, 390 U.S. 629 (1968) 25
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 13
Goss v. *Lopez*, 419 U.S. 565 (1975) 26
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 11
Heryford v. *Parker*, 396 F.2d 393 (10th Cir. 1968) .15, 21, 31
Horacek v. *Exon*, 354 F.Supp. 71 (D. Neb. 1973), No. 72-L-299 (D. Neb., June 4, 1974), *order on consent* No. 72-L-299 (D. Neb., October 31, 1975) 12, 31
Humphrey v. *Cady*, 405 U.S. 504 (1972) 8
J.L. v. *Parham*, 412 F.Supp. 112 (M.D. Ga. 1976) ..9, 14, 19-20, 31
Kaimowitz v. *Michigan Department of Mental Health*, No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973) 10-11
Kendall v. *True*, 391 F.Supp. 413 (W. D. Ky. 1975) 14
Kent v. *United States*, 401 F.2d 408 (D.C. Cir. 1968) 31
Kidd v. *Schmidt*, 399 F.Supp. 301 (E.D. Wis. 1975) 15
Knecht v. *Gillman*, 488 F.2d 1136 (8th Cir. 1973) 10
Lake v. *Cameron*, 364 F.2d 657 (D.C. Cir. 1966) 23
Lessard v. *Schmidt*, 349 F.Supp. 1078 (E.D. Wis. 1972), *vacated on procedural grounds* 414 U.S. 473 (1974), *on remand* 379 F.Supp. 1376 (E.D. Wis. 1974), *vacated on procedural grounds* 421 U.S. 957 (1975), *on remand* No. 71-C-602 (E.D. Wis., May 28, 1976) 11, 14, 15, 23
In re Long, 214 S.E. 2d 626 (N.C. 1975) 31
Lynch v. *Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974) 14, 15, 23
Mackey v. *Procunier*, 477 F.2d 877 (9th Cir. 1973) ..10, 11
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 25
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 13
New York State Association for Retarded Children and Parisi v. *Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973), *modified* No. 72-C-356/357 (E.D.N.Y., May 23, 1973), *order on consent sub nom. New York State Association for Retarded Children and Parisi* v. *Carey*, No. 72-C-356/357 (April 30, 1975), *approved* 393 F.Supp. 715 (E.D.N.Y. 1975) ..12, 23, 31
O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 8, 12, 14, 22, 23-24

Page

Paul v. *Davis*, —— U.S. ——, 96 S.Ct. 1155 (1976) ..11-12
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 25
Pima County Public Fiduciary v. *Superior Court*, 546 P.2d 354 (Ariz. Ct. App. 1976) 15
Planned Parenthood of Central Missouri v. *Danforth*, —— U.S. —— (July 1, 1976) 27, 28, 29-30, 32
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 26
Rochin v. *California*, 342 U.S. 165 (1952) 10
Roe v. *Wade*, 410 U.S. 113 (1973) 11, 27
Saville v. *Treadway*, 404 F.Supp. 430 (M.D. Tenn. 1974) 14-15, 31
Schmerber v. *California*, 384 U.S. 757 (1966) 10
Shelton v. *Tucker*, 364 U.S. 479 (1960) 23
Specht v. *Patterson*, 386 U.S. 605 (1967) 14, 21
Stamus v. *Leonhardt*, No. 73-126-2 (S.D. Iowa, May 20, 1976) 14
State ex rel. Hawks v. *Lazaro*, 202 S.E. 2d 109 (W. Va. 1974) 14
Suzuki v. *Quisenberry*, 411 F.Supp. 1113 (D. Hawaii 1976) 14, 15
Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) 26
United States v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897) 19
United States v. *W.T. Grant Company*, 345 U.S. 629 (1952) 19
Walling v. *Helmerich Payne, Inc.*, 323 U.S. 37 (1944).. 19
Welsch v. *Likins*, 373 F.Supp. 487 (D. Minn. 1974), *enforced* No. 4-72-Civ. 451 (D. Minn., October 1, 1974) 12
Wheeler v. *Glass*, 473 F.2d 983 (7th Cir. 1973) 12
Wolff v. *McDonnell*, 418 U.S. 539 (1974) 13
In re Winship, 397 U.S. 358 (1970) 8, 14, 26
Winters v. *Miller*, 446 F.2d 65 (2nd Cir. 1971), *cert. den.* 404 U.S. 985 (1971) 10
Wisconsin v. *Constantineau*, 400 U.S. 433 (1971) 12
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 25, 26
Wyatt v. *Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971), 334 F.Supp. 1341 (M.D. Ala. 1971), 344 F.Supp. 373 and 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974) 12, 23
Wyatt v. *Hardin*, No. 3195-N (M.D. Ala., February 28, 1975, June 26, 1975, and July 1, 1975) 10

Page

CONSTITUTION:

First Amendment 26
Fourteenth Amendment ..... *passim*

STATUTES:

28 U.S.C. § 1253 6
28 U.S.C. § 1331 3
28 U.S.C. § 1343(3) 3
28 U.S.C. §§ 2281, 2284 3
42 U.S.C. § 1983 3
21 D.C. Code §§ 501 *ff.* (1964 Hospitalization of the Mentally Ill Act) 23
50 P.S. §§ 4402, 4403 (Sections 402 and 403, Pennsylvania Mental Health and Mental Retardation Act of 1966) 3, 4, 18

REGULATIONS:

45 C.F.R. § 249.10(b)(16)(iii), 41 F.R. 2198 (January 14, 1976) 24
45 C.F.R. § 249.13(a)(2)(iv), 39 F.R. 2220, 2227 (January 17, 1974) 24

MISCELLANEOUS:

American Bar Association Commission on Standards of Judicial Administration, Standards Relating to Trial Courts, Standards 2.20, 2.72 17-18
Barton, *Institutional Neurosis* (2d ed. 1966) 12
Brakel & Rock, *The Mentally Disabled and the Law* (rev. ed. 1971) 2
Comment, "Developments in the Law-Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190 (1974) 11
Ellis, "Volunteering Children: Parental Commitment of Minors to Mental Institutions," 62 Calif. L. Rev. 840 (1974) 13, 22
Ennis & Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L. Rev. 693 (1974) 22
Friedman, "Legal Regulation of Applied Behavioral Analysis in Mental Institutions and Prisons," 17 Ariz. L. Rev. 39 (1975) 11

Page

Glenn, "The Least Restrictive Alternative in Residential Care and the Principle of Normalization," in *The Mentally Retarded Citizen and the Law* (1976) 10, 24
Goffman, *Asylums* (1961) 12
Goldstein, Solnit & Freud, *Beyond the Best Interest of the Child* (1973) 10
Gruenberg, "The Social Breakdown Syndrome—Some Origins," 123 Am. J. Psychiatry 12 (1967) 12
Hobbs (ed.), *Issues in the Classification of Children* (1975) 10
Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Psychiatric Facilities Serving Children and Adolescents* (1974) 24
Joint Commission on the Mental Health of Children, *Crisis in Child Mental Health: Challenge for the 1970's* (1970) 10
Lindman & McIntyre, *The Mentally Disabled and the Law* (1961) 2
Matthews, *Mental Disability and the Criminal Law* (1970) 2
Provence & Lipton, *Infants in Institutions* (1962) ... 10
Rock, Jacobson & Janopaul, *Hospitalization and Discharge of the Mentally Ill* (1968) 2
Rosenhan, "On Being Sane in Insane Places," 113 Santa Clara L. Rev. 379 (1973) 22
Shah, "Dangerousness: Some Definitional, Conceptual, and Public Policy Issues," in *Perspectives in Law and Psychology* (in press) 22
Shah, "Some Interactions of Law and Mental Health in the Handling of Social Deviance," 23 Catholic U.L. Rev. 647 (1974) 22
Wolfensberger, *The Principle of Normalization in Human Services* (1972) 24

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INTEREST OF AMICUS CURIAE

The American Bar Association is a national membership organization of the legal profession. It counts as members more than 208,000 lawyers from all states

and has since 1944 maintained an active interest in the field of mental disability law.[1] This interest was intensified in 1973 when the Board of Governors of the American Bar Association established a Commission on the Mentally Disabled, a 17-member interdisciplinary body charged with promoting effective legal assistance to the mentally disabled and with recommending and implementing programs designed to correct systemic deficiencies in the nation's mental disability system. Since its inception, the Commission on the Mentally Disabled has focused its efforts toward, *inter alia,* mobilizing and activating local and state bar associations with regard to legal representation of the mentally disabled (including appropriate backup and support) and has instituted a model monitoring and advocacy project at a state hospital in Pennsylvania.

The Association has also taken the lead in establishing standards for the administration of justice, such as its Standards for the Administration of Criminal Justice and its Standards Relating to Trial Courts (see *infra*). Thus the Association is uniquely experienced and interested in the question now before this Court.

With due consideration of the extended factual legal analysis offered in the briefs of the parties and other *amici,* the Association, with the written consent of the

[1] The Association established a Special Committee on the Rights of the Mentally Ill 32 years ago; this committee's recommendations led ultimately to the publication of a number of path-breaking studies by the American Bar Foundation, created by the Association in 1952. See Lindman & McIntyre, *The Mentally Disabled and the Law* (1961); Rock, Jacobson, & Janopaul, *Hospitalization and Discharge of the Mentally Ill* (1968); Matthews, *Mental Disability and the Criminal Law* (1970); Brakel & Rock, *The Mentally Disabled and the Law* (rev. ed. 1971).

parties,[2] sets forth its views herein on the important question of whether, and to what extent, the Constitution requires procedural safeguards for minors facing civil commitment on the basis of alleged mental disability.

QUESTION PRESENTED BY AMICUS

Whether the due process clause of the Fourteenth Amendment applies to involuntary civil commitment of children on the basis of alleged mental disability, and if so, whether due process requires substantially the same procedural protections for such children as it does for adults.

STATEMENT OF THE CASE

On November 16, 1972, plaintiffs, patients in Pennsylvania's Haverford State Hospital, filed this class action pursuant to 28 U.S.C. §§ 1331 and 1343(3) and 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Pennsylvania. A three-judge court was sought and convened pursuant to 28 U.S.C. §§ 2281, 2284. The action was brought against the Director of Haverford State Hospital and officials of the Pennsylvania Department of Public Welfare, on behalf of all mentally ill and mentally retarded children (18 years of age or younger) indefinitely admitted or committed to mental institutions under Section 402 and 403 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P.S. §§ 4402, 4403.

The minor plaintiffs alleged that the Pennsylvania statutory procedure constituted a denial of due process

[2] Copies of letters indicating the parties' consent have been filed with the Clerk of the Court.

and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States. The statutes in question provide that persons 18 years of age or younger may be institutionalized upon the application of a parent, guardian, or person *in loco parentis*; such institutionalization is considered a "voluntary" admission or commitment.[3] The admission/commitment procedure under challenge provides no opportunity for a hearing or assistance of counsel and merely requires a finding by the director of the facility upon admission that the child "is in need of care or observation."

On July 24, 1975, the District Court ruled on due process grounds, one judge dissenting, that the voluntary admission and commitment procedures of 50 P.S. §§ 4402 and 4403 were unconstitutional as applied to children 18 years of age or younger. 402 F.Supp. 1039. Central to the court's holding was its determination that "a child's interest in not being institutionalized . . . is safeguarded by the Fourteenth Amendment." 402 F. Supp. at 1046-1047.

The District Court specifically rejected defendants' argument that due process protections should not apply because the state is acting as *parens patriae* and not as an adversary in the admission/commitment of children, and because the admission/commitment proceedings are civil, not criminal, in nature. The court held that such reasoning ignores the fact that the child in question is involuntarily removed from his home and community; the stigma associated with civil commitment;

[3] The record in this case indicates that "voluntary" admissions or commitments are often against the expressed wishes of members of the plaintiff class, and are frequently based upon reasons unrelated to the mental condition of the child involved. 402 F.Supp. at 1044; A. 210-221.

and the possibility of erroneously and wrongfully depriving children of their liberty by committing them to mental institutions without proper fact-finding procedures. 402 F.Supp. at 1045-1047. The court also found, on the basis of facts in the record, that "[i]n deciding to institutionalize their children, parents, as well as guardians ad litem or persons standing in loco parentis, may at times be acting against the interest of their children," and thus should not be authorized to waive personal constitutional rights of their children. 402 F.Supp. at 1047-1048.

The District Court then enumerated a range of procedural guarantees which it said must be afforded prior to institutionalization of members of the plaintiff class on the basis of alleged mental disability:

> (1) a probable cause hearing within seventy-two (72) hours from the date of their initial detention; (2) a post-commitment hearing within two (2) weeks from the date of their initial detention; (3) written notice, including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment; (4) counsel at all significant stages of the commitment process and if indigent the right to appointment of free counsel; (5) [presence] at all hearings concerning their proposed commitment; (6) a finding by clear and convincing proof that they are in need of institutionalization; (7) the rights to confront and to cross-examine witnesses against them, to offer evidence in their own behalf, and to offer testimony of witnesses. 402 F.Supp. at 1053.

In its opinion, 402 F.Supp. at 1053 n.26, and its implementing order of November 17, 1975 (A. 831), the court specified that with the exception of notice and counsel, all of the above listed protections could be

waived in appropriate cases by a child or, in some instances, by counsel, subject to approval by the "unbiased tribunal" which was to be the forum for the hearings on commitment.[4]

The defendants appealed the judgment of the District Court to this Court pursuant to 28 U.S.C. § 1253, and made application for a stay pending appeal. A stay was denied by the trial court but subsequently granted by this Court on December 15, 1975. Probable jurisdiction was noted by this Court on March 22, 1976.

SUMMARY OF ARGUMENT

Civil commitment of an individual on grounds of alleged mental illness or retardation is a constitutionally significant deprivation of personal liberty which carries with it serious adverse consequences and disabilities. Such deprivations and disabilities may not constitutionally be imposed without due process of law (in the form of adequate procedural safeguards), where the commitment of the individual is involuntary, in fact or in law. Fact finding procedures are particularly important where, as here, the risk of error is substantial, and where, as here, identification of less restrictive appropriate alternatives may obviate the need for commitment to a mental institution.

The asserted interest of the state in providing treatment to mentally disabled juveniles and in preserving the family unit does not justify a substantially different or less stringent application of the due process

[4] This tribunal was not necessarily required to be a court, 402 F. Supp. at 1049 n.18, and indeed the state was left free to develop alternative procedural safeguards which would be as effective as those specified by the court. 402 F.Supp. at 1048 n.16.

clause with respect to mental disability commitments of children. While parents, of course, can and should be involved in any decision to institutionalize a child, it cannot be assumed in every case that the parent is acting in the best interest of the child. Thus the final commitment decision should be made, pursuant to appropriate procedures, by an objective and unbiased tribunal.

ARGUMENT

1. Placement in a Mental Institution Is a Constitutionally Significant Deprivation of Liberty and Carries With It Other Serious and Important Adverse Consequences.

Loss of liberty. Commitment to a mental institution necessarily entails a "massive curtailment of liberty," *Humphrey* v. *Cady,* 405 U.S. 504, 509 (1972), and inevitably affects "fundamental rights." *Baxstrom* v. *Herold,* 383 U.S. 107, 113 (1966). Perhaps the most basic aspect of constitutional liberty is the right to be free from unwarranted physical confinement. *Arnett* v. *Kennedy,* 416 U.S. 134, 157 (1974). Avoiding extreme restrictions on personal liberty such as those imposed by involuntary civil commitment has been held by this Court to be an interest of "transcending value." *In re Winship,* 397 U.S. 358, 364 (1970).

Although there may be differences between the involuntary commitment of an adult, where the state may assume a more active role, and the commitment of a minor, in which the parents are more directly involved, the results in terms of physical and emotional deprivations are, if different in kind, at least equal in impact and severity.[5] Adults and children alike are deprived of their basic right to personal liberty; all are removed from their homes, communities, and normal daily activities, and subjected to the custody and control of persons (usually agents of the state) not of their own choosing.

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[5] Parental or familial involvement is not uncommon in the civil commitment of adults. See *O'Connor* v. *Donaldson,* 422 U.S. 563, 565 (1975), where the petitioner was committed at the instance of his parents and spent 15 years in the Florida State Hospital for the mentally ill.

A commitment of a minor to an institution may be a traumatizing disruption of his life which cannot fail to have far-reaching consequences. A committed child is separated from a known environment of family, friends, and school and plunged into a frightening, unfamiliar world. See *In re Gault,* 387 U.S. 1, 27 (1967). As one lower court has put it, perhaps a bit sentimentally but nonetheless accurately, in a case similar to the one at bar:

> Like *O'Connor* v. *Donaldson,* 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396, (1975), and the question therein posed and answered, this case raises the most important question of every child's constitutional right to liberty, not only the liberty that includes freedom from bodily restraint, but also the liberty that includes the freedom of an ordinary, every-day child in the United States of America —the freedom to live with mothers, fathers, brothers and sisters in whatever the family abode may be; the freedom to be loved and to be spanked; the freedom to go in and out the door, to run and play, to laugh and cry, to fight and fuss, to stand up and fall down, to play childish games; the freedom to go to school and to frolic with school mates; the freedom to go to Sunday school and church; the freedom to watch and listen or not to watch and listen to television; the freedom to buy candy at the corner store; the freedom to be a normal child in a normal household cared for by normal parents. *J.L.* v. *Parham,* 412 F.Supp. 112, 136 (M.D.Ga. 1976). (Footnote and citation omitted.)

Testimony at the trial in this case established the destructive consequences of removing a child from familiar surroundings and the difficulty of subsequent reintegration into his once familiar world (A. 620-621). The feeling of abandonment occasioned by institution-

alization is especially intense for younger children who are adversely affected by such feelings sooner than older children. Goldstein, Solnit & Freud, *Beyond the Best Interest of the Child,* 40-49 (1973). Institutionalization may also retard the normal intellectual and emotional development of a child.[6] Thus there is no reason to assume that the institutionalization decision, and the fact of institutionalization, are of any less consequence for minors than for adults (A. 575). If anything, the opposite appears to be the case.

Involuntary treatment. In addition to the deprivation of liberty inherent in an indefinite commitment, such commitment carries with it the risk of physically intrusive treatment which, especially if unwarranted, may violate the committed individual's right to bodily integrity. See *Schmerber* v. *California,* 384 U.S. 757, 772 (1966); *Rochin* v. *California,* 342 U.S. 165 (1952). Such treatment modalities may include forced administration of psychotropic medication, see *Winters* v. *Miller,* 446 F.2d 65 (2nd Cir. 1971), *cert. den.* 404 U.S. 985 (1971); aversive conditioning, see *Knecht* v. *Gillman,* 488 F.2d 1136 (8th Cir. 1973) and *Mackey* v. *Procunier,* 477 F.2d 877 (9th Cir. 1973); convulsive therapy, see *Wyatt* v. *Hardin,* No. 3195-N (M.D. Ala., February 28, 1975, June 26, 1975, and July 1, 1975); and even psychosurgery, see *Kaimowitz* v. *Michigan*

[6] Glenn, "The Least Restrictive Alternative in Residential Care and the Principle of Normalization," in *The Mentally Retarded Citizen and the Law,* at 499-501 (1976); Hobbs (ed.), *Issues in the Classification of Children,* at 135, 142-43 (1975); Joint Commission on the Mental Health of Children, *Crisis in Child Mental Health: Challenge for the 1970's,* at 321-324, 330-331 (1970); Provence & Lipton, *Infants in Institutions,* at 19 (1962).

Department of Mental Health, No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973).[7]

Of course, not every institutionalized minor will be subjected to hazardous or intrusive procedures, but the fact is that institutionalization, to some degree, confers upon the state (or perhaps, upon a private facility through the authority of the state) the power to impose treatment upon an institutionalized individual—treatment which by its very nature may involve "impermissible tinkering with mental processes," *Mackey* v. *Procunier, supra,* 477 F.2d at 877, or a violation of the right to privacy. See *Roe* v. *Wade,* 410 U.S. 113 (1973); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). Obviously, no one, especially a child, should be exposed to the risk of such treatment without prior determination that it is warranted and appropriate.

Stigmatization. As courts have noted,[8] institutionalization on mental disability grounds almost inevitably stigmatizes the individual involved in a way that adversely affects him the rest of his life. Such stigmatization may result in or be accompanied by the scorn or obloquy of one's peers, loss of employment possibilities and education benefits, and other civil disabilities that flow from institutionalization (A. 569, 574-575, 621-622, 634, 657).[9] In these circumstances, see *Paul* v.

[7] See generally Friedman, "Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons," 17 Ariz. L. Rev. 39 (1975).

[8] *E.g., Lessard* v. *Schmidt,* 349 F.Supp. 1078, 1088-90 (E.D. Wis., 1972), *vacated on procedural grounds* 414 U.S. 473 (1974), *on remand* 379 F.Supp. 1376 (E.D. Wis. 1974), *vacated on procedural grounds* 421 U.S. 957 (1975), *on remand* No. 71-C-7602 (E.D. Wis., May 28, 1976).

[9] *Cf.* Comment, "Developments in the Law—Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190, 1198-1201 (1974).

Davis, —— U.S. ——, 96 S.Ct. 1155, 1163-1165 (1976), an individual's interest in his good reputation is a liberty (or property) interest entitled to constitutional protection. *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971).

Possibility of inhumane or inadequate treatment. It is unfortunate but true that many of our nation's public mental institutions do not provide minimally adequate habilitative or rehabilitative programming, but in fact may subject their patients or residents to inhumane and unsafe living conditions, destructive psychological pressures, and even physical abuse by other patients or residents or by staff members, all in violation of constitutional guarantees. As in *In re Gault, supra,* 387 U.S. at 15-21, this Court should take note of this possibility, which has been well documented by lower Federal courts,[10] in determining the procedural protections which should attend the commitment of anyone, especially a child, to a mental institution.

[10] *E.g., O'Connor* v. *Donaldson, supra; Wheeler* v. *Glass,* 473 F.2d 983 (7th Cir. 1973); *Davis* v. *Watkins,* 384 F.Supp. 1196 (N.D. Ohio 1974); *Welsch* v. *Likins,* 373 F.Supp. 487 (D. Minn. 1974), *enforced* No. 4-72-Civ. 451 (D. Minn., October 1, 1974); *New York State Association for Retarded Children and Parisi* v. *Rockefeller,* 357 F.Supp. 752 (E.D.N.Y. 1973), *modified* No. 72-C-356/357 (E.D.N.Y., May 23, 1973), *order on consent sub nom. New York State Association for Retarded Children and Parisi* v. *Carey,* No. 72-C-356/357 (E.D.N.Y., April 30, 1975), *approved* 393 F.Supp. 715 (E.D.N.Y. 1975); *Horacek* v. *Exon,* 354 F.Supp. 71 (D. Neb. 1973), *order on consent* No. 72-L-299 (D. Neb., October 31, 1975); *Wyatt* v *Stickney,* 325 F.Supp. 781 (M.D. Ala. 1971), 334 F.Supp. 1341 (M.D. Ala 1971), 344 F.Supp 373 and 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v *Aderholt,* 503 F.2d 1305 (5th Cir. 1974). *Cf.* Gruenberg, "The Social Breakdown Syndrome—Some Origins," 123 Am. J. Psychiatry 12 (1967); Barton, *Institutional Neurosis* (2d ed. 1966); Goffman, *Asylums* (1961).

This Court's decision will have nationwide effect,[11] and in those jurisdictions where the above described conditions exist, the consequences of erroneous institutionalization decisions are especially grave.

As with all the other types of deprivations and adverse consequences mentioned above, no reason appears why such infringements of constitutionally protected rights are of any less consequence in the case of children than they are in the case of adults (A. 575).

2. Confinement in a Mental Institution Cannot Be Constitutionally Imposed by the State or Under the Authority of State Law Without Adequate Procedural Safeguards.

This Court has consistently recognized that prior to a deprivation of a constitutionally protected interest, the due process clause demands that procedures be established to determine the necessity and legal justification for the proposed deprivation. This Court has adopted a flexible approach by tailoring the procedural requirements according to the weight of the competing individual and governmental or societal interests at stake. See, *e.g., Wolff* v. *McDonnell,* 418 U.S. 539 (1974); *Morrissey* v. *Brewer,* 408 U.S. 471, 481-90 (1972); *Bell* v. *Burson,* 402 U.S. 535, 539-42 (1971); *Boddie* v. *Connecticut,* 401 U.S. 371 (1971); *Goldberg* v. *Kelly,* 397 U.S. 254, 263-71 (1970); *Cafeteria Workers Union* v. *McElroy,* 367 U.S. 886, 895 (1961).

While this Court has not ruled directly on the procedural requirements for civil mental disability commitments, it has mandated strict procedural safeguards

[11] As late as 1974, 39 out of the 50 states permitted "voluntary" institutionalization of children by their parents or guardians. Ellis, "Volunteering Children: Parental Commitment of Minors to Mental Institutions," 62 Calif. L. Rev. 840 n.1 (1974).

in the analogous areas of quasi-criminal commitments, *Specht* v. *Patterson,* 386 U.S. 605 (1967), and institutionalization of juvenile delinquents, *e.g., In re Winship, supra; In re Gault, supra.* Indeed, the Chief Justice noted in his concurring opinion in *O'Connor* v. *Donaldson, supra,* 422 U.S. at 580, that

> [t]here can be no doubt that involuntary commitment to a mental institution, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law .... Commitment must be justified on the basis of legitimate state interest, and the reason for committing a particular individual must be established in an appropriate proceeding. (Citations omitted.)

Numerous lower Federal courts, relying in part on the above cited cases, have struck down civil commitment statutes found to be deficient in procedural safeguards. *Stamus* v. *Leonhardt,* No. 73-126-2 (S.D. Iowa, May 20, 1976); *Suzuki* v. *Quisenberry,* 411 F.Supp. 1113 (D. Hawaii 1976); *Doremus* v. *Farrell,* 407 F.Supp. 509 (D. Neb. 1975); *Kendall* v. *True,* 391 F.Supp. 413 (W.D. Ky. 1975); *Lynch* v *Baxley,* 386 F.Supp. 378 (M.D. Ala. 1974); *Bell* v. *Wayne County,* 384 F. Supp. 1085 (E.D. Mich. 1974); *Lessard* v. *Schmidt, supra; Dixon* v. *Attorney General of the Commonwealth of Pennsylvania,* 325 F.Supp. 966 (M.D. Pa. 1971). *Cf. State ex rel. Hawks* v. *Lazaro,* 202 S.E. 2d 109 (W. Va. 1974); *Denton* v. *Commonwealth,* 383 S.W. 2d 681 (Ky. 1964).

Indeed, many courts other than the District Court in the instant case have similarly held due process requirements applicable specifically to mental disability commitments of children. *J.L.* v. *Parham, supra; Saville* v. *Treadway,* 404 F.Supp. 430 (M.D. Tenn. 1974); *Kidd* v. *Schmidt,* 399 F.Supp. 301 (E.D. Wis. 1975). *Cf. Pima County Public Fiduciary* v. *Superior Court,* 546 P.2d 354 (Ariz. Ct. App. 1976).

A. The District Court's Emphasis on the Right to Adequate Notice and to Counsel Was Appropriate in Light of Applicable Precedent and the Factual Record.

The lower court cases have concluded, in particular, that the requirements of due process include the right to meaningful notice given sufficiently in advance of any proceedings so as to apprise the individual of the grounds for the proposed commitment along with the procedural and substantive rights afforded him. *Suzuki* v. *Quisenberry, supra,* 411 F.Supp. at 1127; *Doremus* v. *Farrell, supra,* 407 F.Supp. at 515; *Lynch* v. *Baxley, supra,* 386 F.Supp. at 388; *Bell* v. *Wayne County, supra,* 384 F.Supp. at 1092; *Lessard* v. *Schmidt, supra,* 349 F.Supp. at 1092. In addition, the lower court opinions have uniformly held that an individual faced with the prospect of involuntary commitment for an indefinite period is entitled to the effective assistance of counsel, including the appointment of counsel if the individual cannot afford retained counsel, and that counsel must be made available far enough in advance of any hearing to provide adequate opportunity for preparation. *Suzuki* v. *Quisenberry, supra,* 411 F.Supp. at 1129; *Doremus* v. *Farrell, supra,* 407 F.Supp. at 516; *Lynch* v. *Baxley, supra,* 386 F.Supp. at 389; *Bell* v. *Wayne County,* 384 F.Supp. at 1093-94; *Lessard* v. *Schmidt,* 349 F.Supp. at 1097-98. *Cf. Heryford* v. *Parker,* 396 F.2d 393, 396 (10th Cir. 1968).

In the instant case, the court mandated that notice and the appointment of counsel be nonwaivable, al-

though other procedural requirements may be waived if an unbiased tribunal finds that such a waiver is in the best interest of the child. 402 F.Supp. at 1053 n.26; Order of November 17, 1975 (A. 831). This approach takes into account the unique aspects of a juvenile mental disability commitment, where the child may in certain situations be more subject to implicit or explicit coercion and less likely to appreciate or comprehend the nature of the proceedings,[12] and in other cases may, after consultation with counsel, be in a position to dispense with other formal procedures. Thus the court below merely adopted a logical method both to prevent abusive practices in securing waivers and to eliminate time-consuming and unnecessary challenges to a child's commitment.

Supplementing the legal authority for the appointment of counsel was testimony by psychiatric experts at the trial who agreed that counsel played an important therapeutic role in the proceedings for all involved. The testimony indicated that the advocate for the child is the only individual who can be perceived by the child as representing his interests in the commitment proceedings. Despite assurances to the contrary from parents or the psychiatrists, the child is likely to perceive their role as adversarial. Appointment of counsel for the child thus decreases the chance that the child will feel "railroaded" and makes him more amenable to treatment if commitment is ordered (A. 542-544).

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[12] See A. 590, 630-631.

B. The Right to Counsel, in Particular, Has Been Emphasized by the American Bar Association as a Matter of Sound Judicial Administration.

Appointment of counsel along the lines of the lower court's order has been incorporated into the Standards Relating to Trial Courts drafted by the American Bar Association Commission on Standards of Judicial Administration and adopted by the Association's House of Delegates at its mid-year meeting in February, 1976. Section 2.72 of the trial court standards, which sets forth the procedural requirements for civil commitment proceedings, specifically provides that persons subject to such proceedings are entitled to the assistance of counsel as provided in Section 2.20. That section, in addition to permitting a litigant to employ counsel in any judicial proceeding, requires that counsel be appointed for persons unable to afford their own counsel when they are "subject to a civil proceeding in which the result may be detention for a period longer than 72 hours."

In its commentary with regard to this standard, the Commission on Standards of Judicial Administration noted:

> In addition to representation in criminal cases, counsel should be appointed to represent any person who is the subject of a civil proceeding in which the result may be his physical commitment or detention for any period beyond brief emergency detention. Such proceedings include commitment of the mentally ill, mentally deficient, narcotics addicts, alcoholics, "defective delinquents," "sexual psychopaths," and similarly defined persons. The distinction between these procedures and criminal prosecution is often more theoretical than real, for the state plays an ad-

> versary role, as in criminal cases, and the consequence of adjudication may be long confinement—sometimes for an indefinite period—in an institution where the conditions of custody to a greater or lesser degree resemble a prison. A like necessity for counsel exists in deportation and contempt proceedings. Where the individual involved is mentally disturbed or deficient, or lacks facility in speaking English, the need for counsel is all the more urgent because the person cannot speak effectively for himself.

Clearly, the commitment of a minor falls within the type of situation contemplated by Standard 2.20.

As noted *supra,* the court below enumerated other procedural rights for children facing commitment, all of which find support in some or all of the above cited precedents.[13] *Amicus* would point out also that Section 2.72 of the above described trial court standards and the order entered by the court below are strikingly similar, in that both contemplate a preliminary and final hearing, the right to notice, counsel, and personal presence at such hearings, along with the rights of confrontation and cross-examination and of presenting evidence on one's own behalf. (The complete text of Section 2.72 and accompanying Commentary is attached as the appendix to this brief.)

C. The District Court Was Correct in Finding That the Pennsylvania Scheme for Admission or Commitment of Children Does Not Satisfy the Requirements Enumerated Above.

A plain reading of the Pennsylvania statutes here in question, 50 P.S. §§ 4402 and 4403, demonstrates that

[13] The utility of particular procedural safeguards may vary to some extent depending on the age and maturity of the child involved.

they afford children subject to institutionalization none of the procedural protections mandated by the above cited constitutional decisions or endorsed by the American Bar Association.[14] The fact that the statutes provide for screening of the children at the receiving facility does not cure this total lack of due process safeguards. As another District Court noted in a decision striking down a similar juvenile commitment scheme in Georgia:

> The court is impressed by the conscientious, dedicated state employed psychiatrists who, with the

[14] After filing of this lawsuit, the Pennsylvania Department of Public Welfare promulgated regulations affording minors 13 years of age or older the opportunity to object to their institutionalization. 402 F.Supp. at 1042 n.5. As plaintiffs contended, 402 F.Supp. at 1042, and as the District Court apparently agreed, these regulations do not resolve the challenged statutes' constitutional shortcomings, by reason of, *inter alia,* their inapplicability to minors under the age of 13 years, their failure to require a hearing within a reasonable time, and the absence of any provision for automatic appointment of an advocate to represent the child's interest. Several expert witnesses also expressed misgivings about the regulations promulgated by the state. In summary, they felt that the regulations did not ensure adequate evaluation of the child; that there was a tendency for psychiatrists to agree among themselves for reasons unrelated to the needs of the patient; that admitting psychiatrists to an institution may be unduly influenced by institutional demands; that once institutionalized, individuals tend to accede to the institution's point of view and in spite of the notice requirements, an individual may not be able to express his objections (A. 558, 561, 598, 628-629, 630-631). In any event, actions such as the promulgation of the above described regulations after the initiation of litigation do not moot the case even to the extent of such voluntary cessation or alteration of the challenged practices, for the obvious reason that the defendants-appellants would be free to return to their old ways absent judicial intervention. *United States* v. *W. T. Grant Company,* 345 U.S. 629, 632 (1952); *Walling* v. *Helmerich Payne, Inc.,* 323 U.S. 37 (1944); *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 309-310 (1897).

help of equally conscientious, dedicated state employed psychologists and social workers, faithfully care for the plaintiff children to the extent that state furnished resources and facilities permit. Nevertheless, psychiatry according to psychiatrists is still an inexact science as to which there is the opportunity for wide, sincere differences of opinion among psychiatrists. The opportunity for such wide differences of opinion stems initially and primarily from the fact that psychiatry is dependent upon information that comes from the patient and from other people—parents, family, and staff —who themselves have their own personal interests and problems in communication. To suggest, as we here do, that psychiatrists are not infallible is not an indictment of psychiatry. It is simply to say that psychiatrists like all humans are capable of erring. Since they are capable of erring, psychiatrists like parents cannot statutorily be given the power to confine a child in a mental hospital without procedural safeguards being imposed to guard against errors in judgment and/or the arbitrariness that the best of us humans exhibit from time to time. *J.L.* v. *Parham, supra,* 412 F.Supp. at 138. (Footnote omitted.)

Expert testimony at the trial corroborated the view that placing sole reliance on a psychiatric prognosis, without recourse to review by an unbiased tribunal, will not suffice to prevent unnecessary or inappropriate commitments (A. 550, 569, 585, 604).

D. The Labeling of Juvenile Mental Disability Commitments As Civil (Rather Than Criminal), Benevolent, or Voluntary Does Not Affect the Applicability of the Due Process Clause.

This Court has long avoided the labeling of a particular proceeding as "civil" rather than "criminal" and imposed due process requirements when it was

clear that the potential existed for serious deprivation of constitutionally protected interests. *E.g., Breed* v. *Jones,* 421 U.S. 519, 530 (1975); *In re Gault, supra; Specht* v. *Patterson, supra; cf. Heryford* v. *Parker, supra,* at 396. The same deprivations threatened in these prior juvenile and quasi-criminal "civil" proceedings are present here, and the same reasoning should apply. Similarly, this Court should affirm the District Court's emphatic rejection of the defendants' argument that the benevolent (habilitative or rehabilitative) purpose of juvenile mental disability commitments insulates them from due process requirements. See 402 F.Supp. at 1045 n.7 (and cases cited therein), 1046-1047. Finally, the statutory characterization of these admissions and commitments as "voluntary" should not mask the fact that they are voluntary on the part of the parent (or other person or agency seeking institutionalization), but not on the part of the child being deprived of his liberty. Thus the requirements of due process should apply.

E. The Imposition of Due Process Protections Upon the Institutionalization Decision Is Necessitated Both by the Risk of Erroneous Psychiatric and Other Judgments and by the Need to Ensure That Less Restrictive Alternatives Are Adequately Explored.

The deprivation and consequences of institutionalization described in the first section of this brief would, in themselves, require that institutionalization decisions made by or through the authority of the state be subject to the requirements of the due process clause. The special nature of the admission/commitment decision, however, demands the type of procedural safeguards mandated by the District Court for at least two further reasons—the uncertainty of psychiatric

(and other) diagnoses and the need, from both a professional and constitutional standpoint, to place an allegedly mentally disabled person in the least restrictive setting which will meet his treatment needs.

The Chief Justice has recently noted the "uncertainties" of diagnosis and therapy in the "baffling" field of psychiatry, and has observed, correctly, that "the reported cases are replete with evidence of the divergence of medical opinion in this vexing area." *O'Connor* v. *Donaldson,* 422 U.S. at 579 (Burger, C.J., concurring). This Court has previously remarked upon "the uncertainty of diagnosis in this field and the tentativeness of professional judgment." *Greenwood* v. *United States,* 350 U.S. 366, 375 (1956); *cf.* Ennis & Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L. Rev. 693 (1974). Expert testimony in the instant case indicated that an admission/commitment hearing, or even the knowledge that a hearing may be requested, will encourage psychiatrists to exercise greater care in evaluating prospective patients and thus diminish the chance for an erroneous decision (A. 543-544, 640-641). The pendency of a hearing will also dilute the tendency of some psychiatrists to overdiagnose or to err on the side of caution, assuming disease over health. See Ellis, *supra,* 62 Calif. L.Rev. at 865; Rosenhan, "On Being Sane in Insane Places," 113 Santa Clara L. Rev. 379 (1973). Given the uncertainties in the field of mental disability, and the difficulty in relating psychiatric or psychological diagnoses to legal standards for commitment,[15] proper fact-finding procedures are a

[15] Shah, "Dangerousness: Some Definitional, Conceptual, and Public Policy Issues," in *Perspectives in Law and Psychology* (in press); "Some Interactions of Law and Mental Health in the Handling of Social Deviance," 23 Catholic U.L. Rev. 674 (1974).

practical and constitutional necessity in the civil commitment process.

Moreover, it is no longer open to serious question that state-imposed deprivation of personal liberty for purposes of mental disability treatment, or any other such incursion on constitutionally protected liberties, must be only to the limited extent necessary to accomplish the legitimate purpose of the deprivation or limitation in question. *Shelton* v. *Tucker,* 364 U.S. 479, 488-490 (1960). Numerous lower Federal courts have recognized the applicability of this "least restrictive alternative" doctrine to commitment and treatment of the mentally disabled. *New York State Association for Retarded Citizens and Parisi* v. *Carey, supra,* Order of April 30, 1975, Appendix A at 1; *Lynch* v. *Baxley, supra,* 386 F.Supp. at 392; *Welsch* v. *Likins, supra,* 373 F.Supp. at 501-502; *Lessard* v. *Schmidt, supra,* 349 F. Supp. at 1096; *Wyatt* v. *Stickney, supra,* 344 F.Supp. at 379, 396; *cf. Dixon* v. *Weinberger,* 405 F. Supp. 974 (D.D.C. 1975)[16]; *Covington* v. *Harris,* 419 F.2d 617 (D.C. Cir. 1969); *Lake* v. *Cameron,* 364 F.2d 657 (D.C. Cir. 1966). Indeed, this Court has specifically applied this rationale to mental disability commitments:

> May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State

[16] In this case, based on the 1964 Hospitalization of the Mentally Ill Act, 21 D.C. Code §§ 501 *ff.*, the District Court, in endorsing the least restrictive approach to both commitment and treatment, found, not only that some patients in the District of Columbia mental hospital could fare as well in the community, but also that the treatment needs of 43% of the patients *required* them to be in the community. 405 F.Supp. at 976.

> has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom on their own or with the help of family or friends. See *Shelton* v. *Tucker,* 364 U.S. 479, 488-490. *O'Connor* v. *Donaldson, supra,* 422 U.S. at 575.

The expert testimony in this case (A. 476-77, 577, 619-621) and the professional literature [17] are in accord with the foregoing legal analysis. Thus perhaps the most vital function of procedures such as those required by the court below is to prod the parents, professionals, and others involved in the admission/commitment process to avoid unnecessary and inappropriate institutionalization and, if necessary, to invest the resources of other social agencies and the committing tribunal in identifying or creating treatment alternatives which will not unduly limit the personal freedom (or the therapeutic prognosis) of the individual facing commitment.

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[17] Glenn, *supra,* at 499-514; Wolfensberger, *The Principle of Normalization in Human Services* (1972); Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Psychiatric Facilities Serving Children and Adolescents,* at 55 (1974). This legal and professional consensus is reflected in the Federal Medicaid regulations governing under-21 inpatient psychiatric services (45 C.F.R. § 249.10(b)(16)(iii), 41 F.R. 2198 (January 14, 1976)) and institutional care and treatment of the mentally retarded (45 C.F.R. § 249.13(a)(2)(iv), 39 F.R. 2220, 2227 (January 17, 1974)).

3. No Justification Appears or Has Been Advanced for Denying to Children Facing Commitment on Mental Disability Grounds Substantially the Same Procedural Protections Which Are Required for Adults Under the Due Process Clause.

As noted above, admission/commitment of children to mental institutions involves at least an equivalent degree of deprivations and risks, and is subject to the same possibility of erroneous or inappropriate diagnosis or placement decisions, as the involuntary commitment of adults. In the instant case, the only asserted basis for denying to such children the procedural protections due to adults relates to a somewhat vaguely defined state interest in preserving parental authority and family unity. While as the District Court noted, 402 F.Supp. at 1048 n.12, parents are often in the best position to assess a child's needs, their legitimate concerns can be accommodated without vesting them and state authorities with unfettered control over the institutionalization of children. The asserted state interest cannot justify the deprivation of children's personal liberty without due process of law.

A. The Decisions of This Court Indicate That Parental Authority Is Not Without Limits, and That Children, As Well As Adults, Are Entitled to Constitutional Protections.

This Court has been presented with numerous cases involving the issue of the scope and nature of parental authority in the upbringing of their children, and has generally accorded parents great leeway. *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Ginsberg* v. *New York,* 390 U.S. 629 (1968); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 539 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). However, as important as the result in *Wisconsin* v. *Yoder, supra,* was its carefully circumscribed definition of parents' authority as related to denial of

their children's opportunity for a free, public secondary school education. *Id.* at 230-234.[18]

The parental authority recognized by this Court has never been absolute, and where a superseding state interest has been demonstrated, this Court has not hesitated to condone intrusion into the parent-child relationship, primarily in a situation where the child's welfare could be jeopardized:

> But the family itself is not beyond regulation in the public interest . . . . Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944).

At the same time, this Court has recognized that minors are entitled to many of the same constitutional rights and protections that adults enjoy, *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), particularly with regard to procedural due process. Minors facing the possibility of institutionalization as a result of delinquent behavior have been accorded almost all the procedural safeguards of adult defendants. See *Breed* v. *Jones, supra; In re Winship, supra; In re Gault, supra.* Due process protections have even been accorded to students facing suspensions from school of ten days or less. *Goss* v. *Lopez,* 419 U.S. 565 (1975). Against this background, it would be anomalous to hold that procedural due process protections should not apply as well to indefinite commitment of minors to mental institutions.

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[18] Moreover, *Wisconsin* v. *Yoder* turned on First Amendment freedom of religion questions which have no parallel in the instant case.

B. This Court's Recent Decisions With Regard to Abortion Reflect the Proper Balancing of Interests to Be Applied in the Instant Case.

In *Planned Parenthood of Central Missouri* v. *Danforth,* —— U.S. —— (July 1, 1976), and *Bellotti* v. *Baird,* —— U.S. —— (July 1, 1976), this Court was confronted with the question, *inter alia,* of whether parents could constitutionally prevent their minor daughters from obtaining an abortion under circumstances in which, pursuant to *Roe* v. *Wade, supra,* an adult woman would have an absolute right to terminate an unwanted pregnancy.

"Constitutional rights," this Court observed, "do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri* v. *Danforth, supra,* —— U.S. at ——. Given that in some instances, the state's authority to regulate children may be broader than its authority with respect to adults, the Court continued, it is necessary

> to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult.
>
> One suggested interest is the safeguarding of the family unit and of parental authority. [Citation omitted.] It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the

> minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant. *Planned Parenthood of Central Missouri* v. *Danforth, supra,* —— U.S. at ——.

The Court's holding in the *Planned Parenthood* case leads directly to the conclusion that the existence of a conflict between parent and child does not mean the constitutional rights of the child must inevitably give way. Certainly, a child's interest in avoiding a wrongful, inappropriate, and potentially life-long commitment to a mental institution is equivalent in gravity and importance to a minor's right to obtain an abortion, and the same balancing of interests is required. So examined, the child's interest in not being improperly institutionalized outweighs the parent's (or guardian's) interest in having absolute (or near-absolute) control over the commitment decision.

Moreover, if the state, *qua* state, cannot institutionalize an individual without proper procedural protections, such authority cannot constitutionally be delegated to a parent or other third party. *Planned Parenthood of Central Missouri* v. *Danforth, supra,* —— U.S. at ——.

C. The District Court Properly Accommodated the Interests of the Parent and Child in Requiring Due Process Safeguards.

It must be recalled that the District Court in the instant case did not exclude parents or guardians from participation in the institutionalization decision, but

merely interposed a set of procedural protections and an unbiased tribunal (not necessarily a court) as a check on parental (and professional) authority in this area:

> This finding does not mean that when considering whether or not to institutionalize a child, the state should ignore the opinions and observations of the child's parents. Rather the committing authorities should listen carefully to parents who live with and observe the child on a daily basis for they very likely have invaluable information concerning their child. 402 F.Supp. at 1048 n.12.

Such a holding is fully consistent with the balancing approach adopted by this Court in the above-cited abortion cases. Concurring in *Planned Parenthood of Central Missouri* v. *Danforth, supra,* Mr. Justice Stewart and Mr. Justice Powell indicated that the issue might have been different if, instead of a situation where the parent exercised absolute control over the child's decision, the Court were considering a "provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest."

Such a provision, said the concurring opinion, "would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child." *Planned Parenthood of Central Missouri* v. *Danforth, supra,* —— U.S. at —— (Stewart and Pow-

ell, JJ., concurring); *cf. Bellotti* v. *Baird, supra,* —— U.S. at ——.

This Court's opinions thus contemplate that in situations such as the case at bar, an acceptable formulation can be achieved which allows for parental involvement to an appropriate extent while preserving the rights of the minor child involved, and which utilizes a neutral body to resolve these different and potentially conflicting interests. The order of the court below does no more and, indeed, could do no less.

D. It Cannot Be Assumed That Parents, Faced With Legitimate Familial Problems, Will Always Act in the Best Interest of Their Children With Regard to Commitment to a Mental Institution.

As found by the court below, parents (or guardians), even with the best of motives, may not act, or be capable of acting, in the best interest of their children in seeking their institutionalization. 402 F.Supp. at 1047. This does not mean that such parents are acting malevolently or punitively, although a small number may do so. What it does mean is that very often the child's problem is part of a larger familial problem, and that the entire family should be treated as a whole rather than isolating one member of the family in an institution. But familial problems may produce such a level of frustration and anxiety that parents are simply incapable of objectively considering the child's interests when they make the critical decision of institutionalization (A. 468, 471, 501, 589-590, 601, 617-618, 628).

In other words, minors are likely to suffer or be blamed for problems that plague the entire family and for situations that require help for the family as a

unit, not just for the child. See 402 F.Supp. at 1044; A. 472, 590, 617-618, 630. This being the case, the District Court rightly concluded, parents are in no position to waive a child's personal constitutional rights and make institutionalization decisions virtually on their own. 402 F.Supp. at 1047-1048.

Other courts have also recognized that a child's best interest is not always the motivating factor behind the institutionalization decision. See, *e.g., Heryford* v. *Parker, supra; J.L.* v. *Parham, supra,* 412 F.Supp. at 116-117; *Saville* v. *Treadway, supra,* 404 F.Supp. at 432; *Horacek* v. *Exon, supra,* Order of June 4, 1974; *New York State Association for Retarded Children and Parisi* v. *Rockefeller, supra,* 357 F.Supp. at 762; *In re Long,* 214 S.E.2d 626 (N.C. 1975). As the Chief Justice put it several years ago,

> [l]awmakers in recent years have been sensitive to the need to make civil commitment difficult, recognizing the dangers of relatives "farming" out their kindred into mental institutions for motives not always worthy. *Kent* v. *United States,* 401 F.2d 408, 416 n.4 (1968) (Burger, J., dissenting).

Children, especially those who cannot speak for themselves, must be protected from the risk of such inappropriate and harmful decisions.

E. Claims of Alleged Traumatizing or Disruptive Effects of Due Process Protections for Children Are Not Supported by the Record.

Defendants-appellants contend that a due process hearing prior to institutionalization will have a traumatizing effect on the child or divide and disrupt the family involved. However, in proceedings below, sev-

eral experts testified that a hearing may be beneficial for both parent and child. Properly administered, a hearing can impart to the child a sense that he is being dealt with fairly. A hearing may also help to relieve parents' anxiety or guilt by removing from them the necessity of making the final decision (A. 480-481, 483, 494-495, 574-578, 597, 623-624).[19] Even assuming some unpleasantness or familial discord, it is hard to conceive of these effects as more traumatizing than the effects of indefinite commitment, especially if the institutionalization turns out to be inappropriate or unnecessary. Further, there may be cases where there is little or no family harmony left to preserve and where a hearing will hardly make matters worse (A. 571-572). See the above quoted passage from *Planned Parenthood of Central Missouri* v. *Danforth, supra,* —— U.S. at ——.

Thus the reasons advanced for preserving a system in which the child's interests are not assured of representation cannot be supported on the basis of the record in this case, and, even on their face, do not justify the risk of inappropriate or unnecessary institutionalization.

[19] It should be remembered, again, that a formal hearing will not necessarily be held in every case as a result of the District Court's decision.

CONCLUSION

For the reasons set forth above, the American Bar Association urges this Court to affirm the judgment and decree of the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX

ABA Commission on Standards of Judicial Administration

*Standards Relating to Trial Courts.**

2.72 PROCEEDINGS CONCERNING INVOLUNTARY CARE AND TREATMENT.

In civil proceedings for commitment of the mentally ill, and in all other proceedings in which a disposition of a person may be made on account of his mental or physical condition, the court should ensure that the disposition is made on the basis of adequate information, in accordance with applicable law, and with due regard for the rights of the individual and of the public.

(a) *Procedural Requirements.*

(1) The person who is subject to the proceeding and his family or others immediately concerned for his welfare should be given adequate notice and an opportunity to be heard.

(2) The court should formulate clearly the issues to be resolved, with particular regard for the matters to be considered in the course of medical, psychological, or psychiatric examination and to be made the subject of expert testimony.

(3) Clinical evaluation should be made by professionally qualified persons on the basis of examination and other diagnostic procedures that conform to professionally recognized standards. The person who is the subject of the proceeding should be entitled to obtain and present such an evaluation on his own behalf, at public expense if he lacks the means to obtain it himself. Examiners should be required to testify as to the extent of their examination and the grounds for their conclusions. Except on stipulation of both parties, the testimony of all witnesses, includ-

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* Based on draft approved at February, 1976, mid-year meeting.

ing expert witnesses, should be presented in open court, subject to cross-examination, and included in the record of the proceeding.

(4) The person subject to the proceeding should be entitled to the assistance of counsel as provided in Section 2.20.

(5) In exercising its power to order care and treatment, the court should consider possible alternative dispositions, imposing only as much restraint as is necessary for protection of the individual, his family, or the public, or for accomplishment of required treatment.

(6) When commitment is ordered, the court should specify its purposes, the terms and conditions of any custody or restraint that may be directed, and a time limit, upon the expiration of which the matter is to be brought before the court for further consideration unless the person has been discharged prior to that time according to law.

(7) Whenever a person is found to be mentally ill or mentally retarded or is committed to an institution where he may be unable to take an active part in management of his property or business interests, and it appears that the commitment may be of long duration, the court should inquire into the nature of such interests and the possibility that guardianship of his property or like safeguards should be established to protect them.

(8) Observational commitments. Involuntary commitments for the purposes of observing the individual's mental or physical condition should be to the least restrictive environment in which the observation can be conducted and only for that period of time which is reasonably necessary to complete such observation.

(9) Emergency commitments. Emergency commitments without judicial proceedings should be permitted only in cases of extreme physical danger to human life, health, or safety, and should not be continued beyond the

time reasonably necessary to arrange for a preliminary hearing before a judge.

(b) *Staff Assistance.* The court should have sufficient supporting staff and access to psychiatrists and other professionally qualified experts to carry out its responsibilities under this Section.

COMMENTARY

In recent years the traditional procedures for civil commitment of the mentally impaired, and procedures involving defendants in criminal cases who plead insanity or whose competence to stand trial is in question, have been augmented by an array of statutory procedures for commitment of narcotics addicts, alcoholics, and persons manifesting such types of statutorily defined social deviance as "sexual psychopathy" and "defective delinquency." Because these proceedings are generally termed civil rather than criminal, even when they arise out of criminal prosecution, fewer procedural protections are generally afforded the persons subject to them. The distinction between civil and criminal in many of these cases, however, is more apparent than real. Commitment to an institution on the ground of mental or physical condition is a deprivation of liberty and has many of the characteristics of penal sanctions: confinement (often under harsh conditions), isolation from family and friends, inability to earn a living, persisting social stigma, and sometimes loss of civil and professional rights. Like criminal prosecution, it is often the result of an alleged offense against the law or mores of the community. Procedural safeguards in these cases should not depend on mechanical application of a dichotomy between civil and criminal procedures.

The role of the court in commitment and related procedures should be clearly understood as including responsibility for determining the legal and factual issues that may be presented. The court should not simply ratify recommendations of medical examiners on the assumption that

the question is one of medical diagnosis. Statutory definitions of the classes of persons subject to these proceedings do not necessarily correspond to any generally accepted medical diagnostic category. Moreover, psychiatric diagnosis by one diagnostician may differ greatly from that by another who is equally well qualified, and may sometimes be influenced by irrelevant or insubstantial therapeutic, social, or institutional considerations. The lack of precise criteria for determining the potential dangerousness of an individual should be taken into account, as should the tendency of medical witnesses to overpredict dangerous behavior. The medical expert must provide the court with the medical facts and medical opinions essential to a decision, including diagnosis, prognosis, suitability of proposed treatment, prospect of improvement under possible alternative dispositions, and the like. However, the ultimate decision is not essentially a medical one and involves a substantial element of legal discretion. The special problems encountered in these cases make it desirable that judges have been prepared by experience or training for their role. [Reference omitted.]

Notice and an opportunity to be heard should be provided even though the person subject to the proceeding appears to be mentally incapable of acting upon them. Notice may be delivered by a social worker or other trained person acting on behalf of the court who can explain its meaning and offer assistance in obtaining counsel and making preparations for the hearing. Notice of the hearing should also be given to relatives or friends who may assist the respondent or act in his behalf. Notice should be given sufficiently in advance of scheduled court proceedings to afford a reasonable opportunity for preparation, and should inform the person with particularity of the basis for his detention, his right to counsel and to trial by jury (where available) and the standard upon which he may be detained.

The person who is subject to commitment should be personally present, except where the court finds that he is incapable of attending the hearing or that attending the hearing would worsen his condition or might incite him to injure someone else as a result of hearing the testimony. He should in any event be represented by counsel. See Section 2.20.

Where the respondent is in such a condition that he cannot be present at the hearing, a conference with the judge may allow him to state his case without being required to be present at the formal hearing, but such a conference should not take the place of an evidentiary hearing. Disposition should be made only upon a hearing at which medical and other witnesses are present and subject to cross-examination by counsel and questioning by the court unless the parties agree to presentation on the basis of written documents. Hearings should be on a formal record and decisions based on written findings of facts.

Hearings under sex-psychopath and similar quasi-criminal statutes should provide all the procedural safeguards of a criminal trial. In cases where determination of mental condition is related to criminal proceedings, a separate hearing should be held on mental condition, with adequate notice to the defendant of the questions at issue and the possible consequences of the determination.

The usefulness of medical reports and testimony can often be greatly improved if the court advises examiners and witnesses in advance of the kinds of information it requires for an informed decision. This can be done through examination forms stating the legal questions before the court (for example, whether the individual is competent to stand trial), and indicating the facts required for a finding on the question at issue (for example, whether he could cooperate with counsel in his own defense). Examiners should be required to state the nature and extent of their

examination and the grounds on which they base their findings and conclusions.

Counsel for the respondent should be afforded sufficient time and resources to consult with his client, secure independent professional examination if desired, and inform himself about possible alternatives to commitment. Special training for counsel in mental illness cases can be helpful in improving the quality of representation.

In reaching a disposition, courts should consider all reasonable alternatives such as voluntary hospitalization and treatment in the community without full-time hospitalization. Dispositions should provide for the minimum amount of restraint consistent with accomplishing the purposes of the law.

Commitments should be limited to a relatively short period, at the end of which the necessity of further commitment should be judicially determined. Periodic review of the status of committed persons should be initiated by the court unless a public guardian or defender agency can assume responsibility for doing so. The review should involve notice and formal hearing, with the respondent represented by counsel and medical witnesses subject to cross-examination as in the original commitment proceeding. All reasonable alternatives to commitment should again be considered, and a realistic assessment made of the likelihood of accomplishing further therapeutic objectives by commitment.